

**Braithwaite v Progressive Cas. Ins. Co.**

2013 NY Slip Op 33943(U)

August 16, 2013

Supreme Court, Kings County

Docket Number: 5464/12

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
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Index No.:5464/12  
Motion Date:4-22-13  
Motion Cal. No.:13

KESTON BRAITHEWAITE,

Plaintiff,

-against-

**DECISION/ORDER**

PROGRESSIVE CASUALTY INSURANCE  
COMPANY,

Defendant,  
-----x

The following papers numbered 1 to 5 were read on this motion:

Papers:	Numbered
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	1
Answering Affirmations/Affidavits/Exhibits.....	2-3
Reply	4-5
Affirmations/Affidavits/Exhibits.....	
Other.....	

Upon the foregoing papers the motion is decided as follows:

The plaintiff, Keston Braithwaite, commenced this action to recover uninsured motorist benefits under a policy of insurance issued by the defendant, Progressive Casualty Insurance Company ("Progressive"). Plaintiff now moves for summary judgment.

Plaintiff commenced this action alleging that he was injured in a motor vehicle accident that occurred on September 25, 2011, near the intersection of Fulton Street and Clermont Avenue, Brooklyn, New York. He alleges that he was a passenger in a motor vehicle owned by Dawn Wilkes and operated by Jeryn Bright when said vehicle collided with a 2003 BMW owned and operated by Chard K. Richard. The police report, which plaintiff submitted in support of the motion, reflects that Mr. Richard reported that while he was traveling in a easterly direction on Fulton street, the Wilkes/Bright vehicle crossed over from the westbound side of Fulton Street into his lane of travel and collided head-on into his vehicle. He maintained that Mr. Bright crossed over into this lane while attempting to pass a vehicle in front of him. Mr. Richard goes on to state that in attempting to flee the scene of the accident, Mr. Bright struck two parked cars.

At the time of the accident, Ms. Wilkes was a resident of Pennsylvania and a named insured under a policy of insurance issued by Progressive. The "covered vehicle" listed in the policy is a 2006 Mercedes-Benz R350 bearing Pennsylvania plate number HX 1665, the same vehicle Mr. Bright was operating at the time of the accident. Plaintiff acknowledges in his verified complaint that because Mr. Bright did not have Ms. Wilkes' permission to operate the vehicle, he is not entitled to coverage under the liability portion of the policy. He maintains, however, that under New York law, he is entitled to recover uninsured motorist benefits up to the amount of \$300,000.00, the limits provided for in the policy.

The relevant portions of the uninsured motorist endorsement contained in the Progressive Policy provide as follows:

**PART III – UNINSURED/UNDERINSURED MOTORIST  
COVERAGE**

**INSURING AGREEMENT – UNINSURED MOTORIST  
COVERAGE**

If you pay the premium for this coverage, we will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury**:

1. sustained by an insured person;
2. caused by an accident; and
3. arising out of the ownership, maintenance or use of an uninsured motor vehicle.

The relevant definitions found in the "ADDITIONAL DEFINITIONS" portion of the uninsured motorist endorsement, provide as follows:

When used in this Part III:

1. "Insured person" means:
  - a. **you** or a **relative**;
  - b. any person while operating a **covered vehicle** with the permission of **you** or a **relative**;
  - c. any person **occupying**, but not operating, a **covered auto**; and
  - d. any person who is entitled to recover damages covered by this part three because of **bodily injury** sustained by a person described in a, b, or c above.

\* \* \*

5. "**Uninsured motor vehicle**" means a land motor vehicle or

trailer of any type;

- a. to which no bodily injury liability bond or policy applies at the time of the accident;
- b. to which a bodily injury liability bond or policy applies at the time of the accident, but the bonding or insurance company:
  - i. denies coverage; or
  - ii. is insolvent, or becomes insolvent within six years after the accident occurs;
- c. to which a bodily injury bond or policy applies at the time of the accident, but its limit of liability for bodily injury is less than the minimum limit of liability for bodily injury specified by the financial responsibility law of the state in which the **covered auto** is principally garage; or
- d. whose owner or operator cannot be identified in that causes an accident resulting in **bodily injury** to an **insured person**, provided that the **insured person**, or someone on his or her behalf:
  - i. reports the accident to the police or civil authority within 24 hours or as soon as practicable after the accident; and
  - ii. notifies **us** within 30 days, or as soon as practicable thereafter, that the **insured person** has a cause of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and sets forth the facts in support thereof.

An "**uninsured motor vehicle**" does not include any vehicle or equipment:

- a. owned by **you**<sup>1</sup> or a **relative** or furnished or available for the regular use of **you** or a **relative**;
- b. owned or operated by a self insurer under any applicable motor vehicle law, except a self insurer that is or becomes insolvent;
- c. operated on rails or crawler treads;
- d. designed mainly for use off public roads, while not on public roads;

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<sup>1</sup> For purposes of the various coverage provided under the policy, the policy defines the term "you" and "your" to mean "a person shown as a named insured on the declarations page. Here, Ms. Wilkes is listed as an insured on the declarations page.

- e. while located for use as a residence or premises and not as a vehicle;
- f. that is a **covered auto**; or
- g. that is an **underinsured motor vehicle**.

Progressive correctly maintains that plaintiff is not entitled to uninsured motorist benefits under the policy, since the vehicle he was occupying was both owned by Ms. Wilkes and a "covered auto" and therefore, not an "uninsured motor vehicle" within the meaning of the policy. However, an insurance policy containing liability coverage underwritten out-of-State by insurers authorized to do business in New York is required to conform to New York minimum financial requirements and, if not, is deemed to do so" (*Matter of Allstate Ins. Co. and Ramos*, 234 A.D.2d 41, 650 N.Y.S.2d 210; *Allstate Ins. Co. v. Lopez*, 266 A.D.2d 209, 209-210, 697 N.Y.S.2d 684, 685; Insurance Law § 5107[a]; 11 NYCRR 65.5). Further, since a motor vehicle insured under an out-of-State policy that contains liability coverage falls within the scope of Insurance Law Section 5107, the policy must be construed to contain uninsured motorist benefits (*Midwest Mut. Ins. Co. v. Pisani*, 250 A.D.2d 512, 673 N.Y.S.2d 126). Here, since Progressive is authorized to do business in New York, the Progressive policy "must be construed to contain uninsured motorist benefits" to the extent required by New York Law (*Matter of Midwest Mut. Ins. Co. v. Pisani*, 250 A.D.2d at 513, 673 N.Y.S.2d 126; *Allstate Ins. Co. v. Lopez*, 266 A.D.2d at 210, 697 N.Y.S.2d at 685).

Even though the Progressive policy provided \$300,000.00 in coverage for uninsured benefits, as stated above, those benefits are not available to the plaintiff since the vehicle he was occupying was not an "uninsured motor vehicle" within the meaning of the policy. Plaintiff's entitlement to uninsured benefits stems solely from the provisions of New York law. Under New York law, plaintiff is only entitled to \$25,000.00 in uninsured benefits (Insurance Law § 3420(f)(1)).

Progressive's failure to issue a timely disclaimer of coverage for uninsured motorist benefits is of no consequence. Progressive was not obligated to issue a timely disclaimer pursuant to Insurance Law § 3420(d) because the Progressive policy did not provide plaintiff with coverage for uninsured motorist benefits. A disclaimer is unnecessary when a claim falls outside the scope of a policy's coverage portion, since "requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (*Worcester Insurance Co. v. Bettenhauser*, 95 N.Y.2d 185, 712 N.Y.S.2d 433, 734 N.E.2d 745; see *Markevics v. Liberty Mutual Insurance Co.*, 97 N.Y.2d 646, 735 N.Y.S.2d 865, 761 N.E.2d 557; *American Ref-Fuel Co. of Hempstead v. Employers Insurance Co. of Wausau*, 265 A.D.2d 49, 705 N.Y.S.2d 67).

For all of the above reasons, it is hereby

**ORDERED** that plaintiff's motion for summary judgment is granted solely to the extent that the Court hereby declares that plaintiff is entitled to coverage from Progressive for uninsured motorist benefits up to the amount of \$25,000.00.

This constitutes the decision and order of the Court.

Dated: August 16, 2013

HON. PETER P. SWEENEY, J.S.C.

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PETER P. SWEENEY